

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAMONA ACOSTA,

Plaintiff,

v.

JACK MCMAHON,

Defendant.

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CIVIL ACTION NO. 16-5131

MEMORANDUM OPINION

Smith, J.

November 9, 2016

The *pro se* plaintiff, Ramona Acosta, commenced this action on September 26, 2016, by filing an application to proceed *in forma pauperis* and a complaint. Doc. No. 1. The complaint appears to be a completed version of the form general complaint available on the court's website. *Compare* Complaint, Doc. No. 1-2, with Non-Prisoner General Complaint Form, *available at* <https://www.paed.uscourts.gov/documents/forms/frmcgenf.pdf>.

In the complaint, the plaintiff alleges that in October 2014, she hired the defendant, Jack McMahon, to represent her son in his defense against certain criminal charges. Complaint at 3. Although the plaintiff paid the defendant \$5,000 for this representation, the defendant allegedly failed to attend hearings for the plaintiff's son resulting in the court cancelling the hearings and her son remaining in prison for approximately 18 months. *Id.* On October 22, 2015, the plaintiff fired the defendant "for not show[ing] up or doing anything for [her] son[']s case." *Id.* Because the defendant failed to act on her son's behalf, the plaintiff is pursuing a legal malpractice claim against him and she seeks the return of the \$5,000 she paid to him. *Id.* at 4.

In addition to these allegations against the named defendant, the plaintiff states that she also "want[s] to sue Emily Cherniack for fraud." *Id.* at 3. The plaintiff claims that Ms.

Cherniack was working with the defendant and essentially withheld certain disclosures that she was supposed to review with the plaintiff's son as part of the criminal case. *Id.* at 3-4. Apparently, a tape was included with those disclosures, and the plaintiff's son did not get to hear the tape until a few days prior to trial.¹ *Id.*

With respect to the court's jurisdiction over this action, the plaintiff did not complete the section of the form complaint requiring her to identify the asserted basis for subject-matter jurisdiction. *Id.* at 2-3. Nonetheless, it appeared that she was attempting to invoke this court's diversity jurisdiction insofar as she was asserting state-law claims for fraud and legal malpractice and had indicated that all of the parties had addresses in the Commonwealth of Pennsylvania. *Id.* at 1-4. Because it appeared that the parties were not completely diverse and the amount in controversy did not exceed \$75,000, the court entered an order on October 25, 2016, which (1) granted the application to proceed *in forma pauperis*, and (2) required the plaintiff to show cause why the court should not dismiss the action without prejudice for lack of subject-matter jurisdiction. *See* Order, Doc. No. 2. The order also informed the plaintiff of the court's specific concern with respect the court lacking subject-matter jurisdiction and required that she had until November 8, 2016, to respond to the order to show cause. *Id.* at 2-3 & n.2.

On November 8, 2016, the court received a handwritten letter from the plaintiff.² Regrettably, this letter does not discuss subject-matter jurisdiction at all. Instead, the letter serves as the plaintiff's plea that the court should not dismiss the action because she has a meritorious claim against the defendant. The plaintiff also remarks that because the defendant is

¹ The plaintiff does not state what relief she seeks from Ms. Cherniack.

² It appears that the clerk of court's office received the letter on November 7, 2016. Although this document has yet to be entered on ECF, the court has returned it to the clerk of court for docketing. The court has copied the letter and attached it to this opinion for ease of reference.

a “Top Highly Name Known Lawyer,” if the court dismisses her case she would interpret the dismissal as “an act of [b]ias.”

As previously explained to the plaintiff, this court has the authority and the duty to examine the issue of subject-matter jurisdiction *sua sponte*. See Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”); *Group Against Smog and Pollution, Inc. v. Shenango, Inc.*, 810 F.3d 116, 122 n.6 (3d Cir. 2016) (explaining that “an objection to subject matter jurisdiction may be raised at any time [and] a court may raise jurisdictional issues *sua sponte*”). As also explained to the plaintiff, she has the burden to establish federal jurisdiction in this case because she is the party “asserting its existence.” See *Lincoln Ben. Life Co. v. AEI Life, LLC*, 800 F.3d 99, 105 (3d Cir. 2015) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006)).

Based on the allegations in the complaint, the only possible basis for subject-matter jurisdiction over the plaintiff’s state law claims is 28 U.S.C. § 1332(a)(1), which grants a district court subject-matter jurisdiction over a case in which “the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.” *Id.* Section 1332(a)(1) requires “‘complete diversity between all plaintiffs and all defendants,’ even though only minimal diversity is constitutionally required. This means that, unless there is some other basis for jurisdiction, ‘no plaintiff [may] be a citizen of the same state as any defendant.’” *Lincoln Ben. Life Co.*, 800 F.3d at 104 (quoting *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005) and *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 419 (3d Cir. 2010) (internal footnotes omitted)).

Regarding the citizenship of the parties in this case, the plaintiff alleges that the parties have addresses in the Commonwealth of Pennsylvania. See Complaint at 1-2. Thus, it appears

that the parties are not completely diverse. Concerning the amount in controversy, the only sought-after damages in the complaint is the return of the \$5,000 that the plaintiff paid to the defendant. Therefore, it also appears that the plaintiff has not satisfied the amount-in-controversy requirement. Accordingly, as it does not appear that the parties are diverse and the plaintiff has not satisfied the amount-in-controversy requirement, she has not demonstrated that the court has diversity jurisdiction under section 1332(a)(1).³

The plaintiff has failed to satisfy her burden of establishing federal court jurisdiction over this action and the court must dismiss the action without prejudice. The plaintiff may attempt to pursue her claims against the defendant and Ms. Cherniack in an appropriate state court.

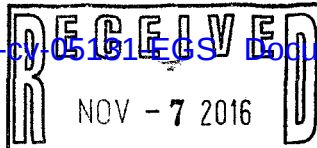
A separate order follows.

BY THE COURT:



EDWARD G. SMITH, J.

³ Although the court has analyzed subject-matter jurisdiction under only section 1332(a)(1), the plaintiff does not appear to assert a federal claim that would confer jurisdiction under 28 U.S.C. § 1331 or any other federal statute. To the extent that she is seeking to raise a civil rights claim under 42 U.S.C. § 1983 (she includes a passing reference to a violation of rights when she discusses the claim against Ms. Cherniack), her claims would fail to state a claim upon which relief could be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) (requiring the court to dismiss a complaint if it fails to state a claim upon which relief could be granted); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that for a complaint to survive dismissal, it must contain “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face” (quotations omitted)). In this regard, and after viewing the complaint liberally because the plaintiff is proceeding *pro se*, she has not and cannot assert a section 1983 claim against these defendants because “a suit under § 1983 requires the wrongdoers to have violated federal rights of the plaintiff, and that they did so while acting under color of state law.” *Groman v. Township of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995). Neither of the defendants are state actors and nothing in the complaint provides a basis for concluding that the plaintiff’s rights were violated. *See Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 277 (3d Cir. 1999) (“Attorneys performing their traditional functions will not be considered state actors solely on the basis of their position as officers of the court.”). Furthermore, to the extent that the plaintiff is asserting that the defendants violated her son’s rights, she lacks standing to raise claims based on harm to her son. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“A federal court’s jurisdiction . . . can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action.” (citation and internal quotation marks omitted); *see also Beauchamp v. Chichester Sch. Dist.*, No. CIV. A. 05-4141, 2005 WL 3110822, at *2-3 (E.D. Pa. Nov. 17, 2005) (holding, in case involving a minor child, that the parents lacked standing to bring individual claims when only allegations pertained to purported violations of their son’s rights).



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To ~~whom~~ it

16-5131

Concerns the District Court
 this I Ramona Acosta
 I am repording Back to
 your Court for the letter
 I recied from your
 Office Asking me show
 reason my case should
 not Be dismiss I feel
 and I hope and pray this
 case will not Be dismiss
 Because Jack Mcman is a
 Highly ^{name} known Lawyer
 and I feel if this case
 Shouldnt Be dismiss Because
 I hire Jack and gave
 Jack 5,000 dollars what
 he ask me to Represent
 my son Jaine and not to
 long after I gave him
 money to Represent my son
 he started not showing up
 like he told my ^{son} Merwin
 was going to show every
 time my ^{son} had to show
 up the 5000 Paper that
 was standing there By

2

Self in front of
the Judge I didn't
~~Keep him~~ Give 5000 dollars
to Jack Because I have
money like that I am
poor person I live on
fix income once a month
I gave Jack money to
represent my son he
didn't put up his end
my son sat waiting in jail
for almost 1 year and
2 months until month is
half before his trial We
had to fire him I feel
if he knew he wasn't
not going to do any
thing or represent my son
right I would rather
he had not taken my
money and do me
wrong But this
way scam me out of
my money that I put
up for my son
just left over

3
So I ask you
please dont dismiss
this cause Be^{cause} it was
Really unfair on Jack
part How he think's
he ^{can} scam me out money
~~not done~~ and ^{not} Be Held
Accountable to Return
my money ^{Back} which He
did nothing he promise my
son So I Really
feel if this case is throw
out Jack feels that he
can do this to anybody
and get away? Because Like
I said he a top Highly name
Knowⁿ Lawyer and if get
Dismiss I would take this
case as an act of Bias

Well this all for now
untill your court
make a decision

Thank you

Very much
from Ramona Acosta

Smothe
Blue Berriors
Honey
Gourmet
Ster Seed

now
the
decision
for
your
own
area